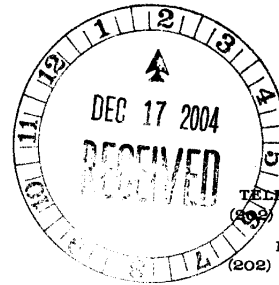


212798

SLOVER & LOFTUS

ATTORNEYS AT LAW
1224 SEVENTEENTH STREET, N. W.
WASHINGTON, D. C. 20036-3003

WILLIAM L. SLOVER
C. MICHAEL LOFTUS
DONALD G. AVERY
JOHN H. LE SEUR
KELVIN J. DOWD
ROBERT D. ROSENBERG
CHRISTOPHER A. MILLS
FRANK J. PERGOLIZZI
ANDREW B. KOLESAR III
PETER A. PFOHL
DANIEL M. JAFFE
KAREN HASSELL HERREN
KENDRA A. ERICSON



TELEPHONE:
(202) 347-7170
FAX:
(202) 347-3619

WRITER'S E-MAIL:
cml@sloverandloftus.com

December 17, 2004

BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 711
Washington, DC 20423-0001

Office of the Secretary
Surface Transportation Board
1925 K Street, N.W., Room 711
Washington, DC 20423-0001

Re: Docket No. 42091, Arizona Public Service Company and
PacifiCorp v. The Burlington Northern and Santa Fe Railway Company

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding please find an original and ten (10) copies of the Verified Complaint of Arizona Public Service Company and PacifiCorp against The Burlington Northern and Santa Fe Railway Company. We also have enclosed a check in the amount of \$66,600.00 to cover the applicable filing fee.

Please date stamp the extra copy of this Verified Complaint and return it to our messenger.

Respectfully submitted,

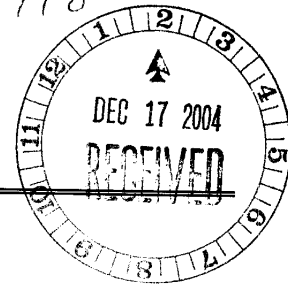
C. Michael Loftus
An Attorney for Arizona Public Service
Company and PacifiCorp

Enclosures

cc: Samuel M. Sipe, Jr., Esq.
Jeffrey R. Moreland, Esq.

FILED
DEC 17 2004

212798



BEFORE THE
SURFACE TRANSPORTATION BOARD

ARIZONA PUBLIC SERVICE COMPANY
400 North 5th Street
Phoenix, AZ 85004, and

PACIFICORP
825 N.E. Multnomah Street
Portland, OR 97232

Complainants,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY
2500 Lou Menk Drive
Forth Worth, Texas 76131

Defendant.

Docket No. 42091

Office of the
General Counsel

DEC 17 2004

Public Hearing

VERIFIED COMPLAINT

ARIZONA PUBLIC SERVICE COMPANY
400 North 5th Street
Phoenix, AZ 85004

PACIFICORP
825 N.E. Multnomah Street
Portland, OR 97232

By: C. Michael Loftus
Frank J. Pergolizzi
Andrew B. Kolesar III
Peter A. Pfohl
Kendra A. Ericson
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

OF COUNSEL:

Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Dated: December 17, 2004

Attorneys for Complainants

BEFORE THE
SURFACE TRANSPORTATION BOARD



ARIZONA PUBLIC SERVICE COMPANY)
400 North 5th Street)
Phoenix, AZ 85004, and)

PACIFICORP)
825 N.E. Multnomah Street)
Portland, OR 97232)

Complainants,)

v.)

Docket No. 42091

THE BURLINGTON NORTHERN AND)
SANTA FE RAILWAY COMPANY)
2500 Lou Menk Drive)
Forth Worth, Texas 76131)

Defendant.)

VERIFIED COMPLAINT

COME NOW the Arizona Public Service Company ("APS") and PacifiCorp, and file this Verified Complaint, under 49 U.S.C. §§ 10701 and 11701, seeking the establishment of reasonable rates and other terms for unit train coal transportation service by The Burlington Northern and Santa Fe Railway Company ("BNSF") between the McKinley and Lee Ranch Mines in New Mexico and the Cholla Electric Steam Generation Station ("Cholla"), located near Joseph City, Arizona. In support hereof, Complainants show:

1. Complainant APS is an Arizona corporation engaged in the generation, transmission, distribution and sale of electricity and energy-related products to wholesale and

retail customers in the western United States. APS provides retail electric service in most of the State of Arizona and has over 930,000 customers.

2. Complainant PacifiCorp is an Oregon corporation engaged in the production, transmission, distribution and sale of electric power at wholesale and at retail to approximately 1.5 million customers throughout parts of Oregon, Washington, California, Wyoming, Utah and Idaho.

3. Defendant BNSF is a Class I common and contract carrier by railroad engaged in the transportation of property in interstate and intrastate commerce. BNSF is subject to the Revised Interstate Commerce Act, as amended by the Interstate Commerce Commission Termination Act of 1995 (49 U.S.C. §§ 10101 *et seq.*), and to the jurisdiction of this Board with respect to its interstate rail transportation service.

4. The Cholla Station is located at or near Joseph City, Arizona. Cholla Station is comprised of four coal-fired units with a total net output of approximately 1000 MW and coal consumption of approximately 3.5 to 4 million tons per year. Cholla Station Units 1, 2 and 3 are owned and operated by APS. Cholla Station Unit 4 is owned by PacifiCorp, but is operated by APS.

5. The coal burned at Cholla Station comes primarily from mines located in New Mexico. This coal includes coal that is supplied from the McKinley Mine ("McKinley") and the Lee Ranch Mine ("Lee Ranch") (collectively, the "New Mexico Origins"). The McKinley Mine is owned and operated by The Pittsburg & Midway Coal Mining Company ("P&M"), a subsidiary of ChevronTexaco. Coal from McKinley is supplied to APS pursuant to a coal supply agreement between APS and P&M. The Lee Ranch Mine is owned and operated by

the Lee Ranch Coal Company, a subsidiary of Peabody Energy Company. Coal from Lee Ranch has been supplied to APS pursuant to coal supply agreements between APS and Peabody Coal Sales, acting for and on behalf of Lee Ranch Coal Company.

6. BNSF has established common carrier rates for service from McKinley and Lee Ranch. BNSF published a common carrier rate for service from McKinley to Cholla in BNSF-supplied railcars in BNSF's Common Carrier Pricing Authority BNSF 90069, a copy of which is included in Exhibit A. The \$6.91 per ton rate set forth in that Pricing Authority was addressed in the Board's recent decision in Docket No. 41185, Arizona Public Service Co. and PacifiCorp v. The Burlington Northern and Santa Fe Railway Co. (STB served December 13, 2004) at 4, 8. According to that decision, "[o]n May 22, 2003, the Board suspended the (now-vacated) prescription and removed its prescriptive effect, entitling BNSF to collect its increased rate as of that date. A new complaint may therefore challenge BNSF's rate as of that date." Id. at 8; see also Docket No. 41185, Arizona Public Service Co. and PacifiCorp v. The Burlington Northern and Santa Fe Railway Co. (STB served May 12, 2003) at 3, 6. Complainants challenge the \$6.91 per ton rate from and after May 22, 2003, but without prejudice to their rights to challenge the Board's decisions in Docket No. 41185 vacating the Board's rate prescription for the McKinley traffic.

7. The BNSF common carrier rates applicable to service from Lee Ranch to Cholla in BNSF-supplied cars are set forth in its Common Carrier Pricing Authority BNSF 90040/90040-A. Complainants challenge such rates as in effect from and after January 1, 2003. Supplement No. 4 to BNSF 90040/90040-A, containing the Lee Ranch rates effective January 1, 2003, is set forth in Exhibit B.

8. BNSF exerts qualitative and quantitative market dominance over the issue traffic under 49 U.S.C. § 10707. Qualitative market dominance exists because (i) the only practical means for Complainants to obtain high volume coal deliveries from the New Mexico Origins to Cholla is by rail; (ii) BNSF is the only rail carrier serving Cholla; and (iii) BNSF is the only rail carrier serving the New Mexico Origins. Quantitative market dominance exists because BNSF's McKinley and Lee Ranch rates vastly exceed the 180% rate-to-variable cost jurisdictional threshold set forth at 49 U.S.C. § 10707(d).

9. The McKinley and Lee Ranch common carrier rates and charges (including BNSF's fuel surcharge on traffic from Lee Ranch) exceed the maximum reasonable levels permitted under 49 U.S.C. § 10701(d)(1) and 49 U.S.C. § 10702. These common carrier rates and charges, and the manner of their collection, also violate the Board's constrained market pricing guidelines set forth in Coal Rate Guidelines – Nationwide, 1 I.C.C.2d 520 (1985). The guidelines are applicable because the Cholla movements involve high-volume, repetitious unit train coal traffic. See 49 C.F.R. § 1111.1(a).

10. Complainants reserve the right to present evidence challenging the lawfulness of the service terms included within BNSF Common Carrier Pricing Authorities 90069 and 90040/90040-A, if, as applied to the Cholla service, they result in, or constitute, unreasonable rates, charges or practices in violation of 49 U.S.C. §§ 10701(d)(1), 10702 and 10746. In particular, Complainants reserve the right to challenge BNSF's annual minimum volume requirement in Common Carrier Pricing Authority 90069 regarding service from McKinley.

11. This Verified Complaint covers any changes to, or modification of, any of the terms that BNSF may establish during the course of this proceeding.

12. Pursuant to 49 C.F.R. § 1111.1, Complainants state that arbitration was considered, but rejected, as a means of resolving this dispute. Complainants will participate in the mandatory mediation process set forth at 49 C.F.R. § 1109.4, but request, through their accompanying Petition to Hold in Abeyance Pending Judicial Review, that this process be deferred along with the balance of the procedural schedule in the case.

13. Neither this proceeding, nor the granting of the relief requested here, will constitute a major federal action significantly affecting the quality of the human environment or the conservation of energy resources.

WHEREFORE, Complainants APS and PacifiCorp request that Defendant BNSF be required to answer the charges herein; that after a hearing and investigation conducted pursuant to 49 U.S.C. § 10704(a)(1) and the Board's implementing regulations, the Board find the assailed rates, rules, charges and practices are unreasonable in violation of 49 U.S.C. §§ 10701(d)(1) and 10702; that the Board prescribe maximum reasonable rates, and reasonable rules, charges and practices as requested by Complainants; that the Board award Complainants reparations pursuant to 49 U.S.C. § 11704(b) for all unlawful payments made to BNSF; and that

VERIFICATION

STATE OF ARIZONA)
) ss:
COUNTY OF MARICOPA)

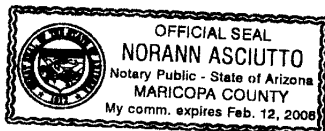
Kenneth Nordlander, being duly sworn, deposes and says that he is the Fossil Fuel Procurement Manager of Arizona Public Service Company; that has read the foregoing Verified Complaint and knows the contents thereof; and that the same are true as stated, except as to those statements made on information and belief, and as to those, that he believes them to be true.


Kenneth Nordlander
Kenneth Nordlander

Subscribed and sworn to before me
this 16TH day of DECEMBER, 2004.

Norann Ascianto
Notary Public for the State of Arizona

My Commission expires 2/12/06



REDUCTION	
BNSF 90069	Original Title Page
<div></div>	
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY	
BNSF PRICE LIST 90069	

LOCAL ALL-RAIL RATES	
ON	
RAW SUBBITUMINOUS COAL	
STCC 11-211 series, 11-212 series, and 11-221 series	
BETWEEN STATIONS IN THE CONTINENTAL UNITED STATES	
THIS TARIFF ALSO APPLIES ON INTRASTATE TRAFFIC	
Governed, except as otherwise provided herein: By UFC 6000-Series and Tariff ICC BN 6041-Series	
For explanation of abbreviations and reference marks, see Item 100.	
ISSUED December 26, 2002	EFFECTIVE January 1, 2003
Issued by Paul M. Anderson, P.O. Box 961069, Ft. Worth, TX 76161-0069	

**The Burlington Northern and Santa Fe Railway Company
Common Carrier Pricing Authority BNSF 90069**

Effective Date: January 1, 2003.

Expiration Date: Effective until superceded or cancelled.

Commodity: Raw coal used for steam purposes, as described in Standard Transportation Commodity Code Tariff ("STCC") 6001 series, with a STCC number of 11-211 series, 11-212 series and 11-221 series (including bituminous, sub-bituminous and lignite), not including beneficiated, enhanced, processed or synthetic coal ("Coal"). Coal treated with additives used exclusively for dust control or for protection against freezing shall not be considered "beneficiated, enhanced or processed".

Origins: McKinley Mine (North Tipple), NM.

Destinations: Cholla Generating Station located near Joseph City, AZ.

Route: BNSF direct.

Shipper: The Party tendering Coal for movement under this publication.

Freight Rates: Rates stated in U.S. Dollars Per Net Ton (2,000 pounds avoirdupois) Coal:

STB Prescribed Freight Rate	BNSF Proposed Freight Rate*
\$4.21	\$6.91

* Contingent on vacation of rate prescription in STB Docket 41185. The difference in transportation charges resulting from application of the BNSF proposed and STB prescribed Freight Rates shall be paid into escrow beginning January 1, 2003.

Minimum Tender and Weights: Weights are stated in terms of Net Tons (2,000 pounds avoirdupois). Lading Weights shall be ascertained at Origin by Shipper, its agent, or the Coal mine operator, at no charge to BNSF, and will be provided to BNSF via either electronic data interchange or facsimile upon release of a loaded train. BNSF shall have the right to inspect and certify the Origin scales. Minimum Weight Per Carload shall be ninety-five (95) Net Tons. Minimum Tender shall be sixty (60) Railcars. Minimum Weight per Trainload shall be the product of the Minimum Weight Per Carload times the Minimum Tender. Freight Charges will be assessed on the basis of the applicable Minimum Weight per Trainload or the actual weight of Coal per Trainload whichever is greater. In the event that fewer than sixty (60) Railcars are furnished by BNSF for loading, the Minimum Weight per Trainload shall be reduced by 95 Net Tons for each Railcar not furnished which results in a train of less than Minimum Tender.

Minimum Volume: The STB prescribed Freight Rate applicable to Coal shipments shall be subject to a Minimum Volume of 3,500,000 Net Tons per Calendar Year. In the event that the Minimum Volume is not shipped, a Tonnage Shortfall shall exist. In the event of a Tonnage Shortfall, Shipper shall pay BNSF a Balance Due equal to the difference between \$14,735,000 and the total amount otherwise paid by Shipper for transportation service provided pursuant to this Common Carrier Pricing Authority. This Minimum Volume provision shall not apply to coal shipments moving under the BNSF proposed Freight Rate.

Railcar Supply and Tender Requirements: BNSF shall provide open top rapid discharge hopper cars ("Railcars") suitable for loading not less than 95 Net Tons of Coal per carload. Claims for damage to or destruction of BNSF provided Railcars while Loading at Origin or Unloading at Destination shall be handled in accordance with the procedures set forth in the Field Manual and Office Manual of the Association of American Railroads Interchange Rules, as amended from time to time.

Loading: Shipper or its agent shall be responsible for the provision of appropriate loading facilities. All cars in each shipment shall be tendered to BNSF for loaded movement within four (4) hours of Actual or Constructive Placement for loading at Origin ("Loading Free Time").

Loading Free Time shall be extended for a period of time equivalent to that by which loading is delayed or prevented as a result of a Loading Disability or any occurrence attributable to BNSF which prevents or impedes loading. A Loading Disability means any of the following events which directly results in the inability to load a train at Origin: (1) an Act of God; (2) a strike or other labor disturbance; (3) a riot or other such civil disturbance; (4) unusual snow or ice accumulation sufficient to prevent or delay loading of a train; or (5) mechanical or electrical breakdown, explosion, or fire affecting the loading facilities at Origin.

Actual Placement is made when an empty train arrives at the designated loading point at Origin and the train crew requests loading instructions. If Actual Placement is prevented due to any cause attributable to Shipper, its agents, or the mine operator, BNSF may Constructively Place the train at any available hold point. In the event of Constructive Placement, Loading Free Time shall begin when BNSF notifies Shipper or its agent that a train has arrived at the hold point and shall end when the train is Actually Placed at Origin.

In the event that total time from Actual or Constructive Placement to release of a loaded train exceeds Loading Free Time, Shipper shall pay such charges as specified in BNSF Price List 6041 series for holding a train in excess of Loading Free Time.

Unloading: Shipper or its agent shall be responsible for the provision of appropriate unloading facilities, and shall be responsible for unloading of railcars at Destination. All cars in each shipment shall be tendered to BNSF for empty movement within twelve (12) hours of Actual or Constructive Placement for unloading at Destination ("Unloading Free Time").

Unloading Free Time shall be extended for a period of time equivalent to that by which unloading is delayed or prevented as a result of an Unloading Disability or any occurrence attributable to BNSF which prevents or impedes unloading. An Unloading Disability means any of the following events which directly results in the inability to unload a train at Destination: (1) an Act of God; (2) a strike or other labor disturbance; (3) a riot or other such civil disturbance; (4) unusual snow or ice accumulation sufficient to prevent or delay unloading of a train; or (5) mechanical or electrical breakdown, explosion, or fire affecting the unloading facilities at Destination.


Actual Placement for Unloading is made when a loaded train is placed on Shipper's tracks at Destination. If Actual Placement is prevented due to any cause attributable to Shipper or its agent, BNSF may Constructively Place the train at any available hold point. In the event of Constructive Placement, Unloading Free Time shall begin when BNSF notifies Shipper or its agent that a train has arrived at the hold point and shall end when the train is Actually Placed at Destination.

In the event that total time from Actual or Constructive Placement to release of an empty train exceeds Unloading Free Time, Shipper shall pay such charges as specified in BNSF Price List 6041 series for holding a train in excess of Unloading Free Time.

Accessorial Services: Coal unit train accessorial services provided by BNSF and charges therefor, other than specified in this Common Carrier Authority, shall be as described in BNSF Authority 6041 series or successors thereto, except that no change in destination shall be permitted.

Billing and Payment: BNSF will bill each shipment under the terms of the Uniform Straight Bill of Lading. For purposes of determining compliance with the Minimum Volume provision herein, BNSF Waybill Date shall be the date a shipment is made pursuant to this Common Carrier Pricing Authority. All railcars for each shipment are to be billed on one (1) Bill of Lading. This **Common Carrier Authority, BNSF 90069**, correct address and patron code must be shown on the Bill of Lading to insure accurate billing. Freight charges will be billed by BNSF and paid by Shipper by electronic transfer of funds within fifteen (15) calendar days of receipt of BNSF's invoice. In the event that Shipper does not make timely payment, or if adverse credit conditions occur, which in BNSF's judgement could affect Shipper's ability to meet payment terms, BNSF may require Shipper to pay cash in advance of service for all amounts for which Shipper is liable under this Common Carrier Authority.

Other Provisions: Shipments made under the provisions of this Common Carrier Authority are subject to the Uniform Freight Classification 6000 series or its successor, BNSF Rules 6100 series, applicable tariffs, statutes, federal regulatory rules and regulations, AAR rules, and other accepted practices within the railroad industry as may be amended from time to time.

REDUCTION	
BNSF 90040-A	Original Title Page
	
<p>THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY</p> <p>BNSF PRICE LIST 90040-A (Cancels BNSF 90040)</p> <p>-----</p> <p>LOCAL ALL-RAIL RATES</p> <p>ON</p> <p>RAW SUBBITUMINOUS COAL</p> <p>(STCC 11-21)</p>	
<p>BETWEEN STATIONS IN THE CONTINENTAL UNITED STATES</p>	
<p>THIS TARIFF ALSO APPLIES ON INTRASTATE TRAFFIC</p>	
<p>Governed, except as otherwise provided herein: By UFC 6000-Series and Tariff ICC BN 6041-Series</p>	
<p>For explanation of abbreviations and reference marks, see Item 100.</p>	
ISSUED December 16, 20002	EFFECTIVE January 1, 2003
<p>Issued by Paul M. Anderson, P.O. Box 961069, Ft. Worth, TX 76161-0069</p>	

The Burlington Northern and Santa Fe Railway Company
Common Carrier Pricing Authority BNSF 90040-A
Supplement No.4

Effective Date: January 1, 2003.

Expiration Date: Effective until superceded or cancelled.

Commodity: Raw coal used for steam purposes, as described in Standard Transportation Commodity Code Tariff ("STCC") 6001 series, with a STCC number of 11-211 series, 11-212 series and 11-221 series (including bituminous, sub-bituminous and lignite), not including beneficiated, enhanced, processed or synthetic coal ("Coal"). Coal treated with additives used exclusively for dust control or for protection against freezing shall not be considered "beneficiated, enhanced or processed".

Origins: 1. Lee Ranch Mine, NM ("LRM")
2. Spring Creek Mine, (Nerco Jct.), MT ("SCM")

Destinations: 1. Coronado Generating Station located near St. John's, AZ ("Coronado")
2. Cholla Generating Station located near Joseph City, AZ ("Cholla")

Route: BNSF direct.

Shipper: The Party tendering Coal for movement under this publication.

Freight Rates: Weights stated in terms of Net Tons (2,000 pounds). Rates stated in U.S. Dollars Per Net Ton Coal:

Origin	Destination	Min Weight Per Carload	Shipper Provided Private Railcars	BNSF Provided Railcars
LRM	Coronado	95 Net Tons	\$7.65	\$8.69
		119 Net Tons	\$7.52	\$8.56
LRM	Cholla	95 Net Tons	...	\$8.75
		116 Net Tons	...	\$8.62
SCM	Cholla	116 Net Tons	...	\$19.87

Fuel Surcharge Application: Freight Rates herein shall be subject to fuel cost recovery surcharges, if any, applied by BNSF as specified by BNSF Rules 6100 series.

Trainload and Railcar Weights: Weight shall be determined at Origin by Shipper, its agent, or the Coal mine operator, at no charge to BNSF, and will be provided to BNSF via either electronic data interchange or facsimile upon release of a loaded train. BNSF shall have the right to inspect and certify the Origin scales. Minimum Weight per Trainload shall be the product of the applicable Minimum Weight per Carload times the Minimum Tender. Freight Charges will be assessed on the basis of the applicable Minimum Weight per Trainload or the actual weight of Coal per Trainload whichever is greater. For trains consisting of BNSF provided Railcars, in the event BNSF furnishes fewer than the Minimum Tender specified herein, Minimum Weight per Trainload shall be reduced by the applicable Minimum Weight per Carload for each BNSF provided railcar not furnished which results in a train of less than Minimum Tender.

Railcar Supply and Tender Requirements:

Coronado:

- (A) BNSF provided Railcars shall be, at BNSF's sole option, either steel or aluminum open top rotary gondolas or rotary or open top hopper cars suitable for loading not less than 95 Net Tons of Coal per carload. The Minimum Tender for a train of BNSF provided Railcars is one hundred fifteen (115) such Railcars.
- (B) Shipper provided Railcars shall be steel or aluminum open top rotary gondolas suitable for loading not less than 95 Net Tons per carload, not subject to any private car mileage allowance and furnished at no cost to BNSF. The Minimum Tender for a train of Shipper provided Railcars is one hundred fifteen (115) such Railcars.

Cholla:

- (A) BNSF provided Railcars shall be, at BNSF's sole option, either steel or aluminum open top rapid discharge hopper cars suitable for loading not less than 95 Net Tons of Coal per carload. The Minimum Tender for a train of BNSF provided Railcars is ninety nine (99) such Railcars.

Claims for damage to or destruction of either Shipper provided or BNSF provided Railcars shall be handled in accordance with the procedures set forth in the Field Manual and Office Manual of the Association of American Railroads Interchange Rules, as amended from time to time. Unless otherwise provided, BNSF shall not be liable for loss or damage caused by defects in design, materials or workmanship of Shipper provided Railcars, or events of force majeure, or to improper loading or unloading performed by the Shipper, its agents, contractors, consignors or consignee.

BNSF Railcar Out of Route Charge: BNSF provided Railcars requested by the Shipper for loading at Lee Ranch Mine will be furnished at no additional charge when an immediately preceding train of such Railcars has been unloaded at Destination. In the event that an immediately preceding train of such Railcars has not been unloaded at Destination, not less than a Minimum Tender of BNSF provided Railcars shall be positioned to Lee Ranch Mine subject to the Out-of-Route Charge For Transporting Empty Coal Cars as specified in BNSF Price List 6041 series. Appropriate Railcars for this service shall be designated at BNSF's sole discretion. Mileage used for calculation of a BNSF Railcar Out-of-Route Charge shall be via the route of movement to Lee Ranch Mine from the BNSF point where such Railcars are located when they are designated for loading pursuant to this Common Carrier Pricing Authority.

Loading: Shipper or its agent shall be responsible for the provision of appropriate loading facilities. All cars in each shipment shall be tendered to BNSF for loaded movement within four (4) hours of Actual or Constructive Placement for loading at Origin ("Loading Free Time").

Loading Free Time shall be extended for a period of time equivalent to that by which loading is delayed or prevented as a result of a Loading Disability or any occurrence attributable to BNSF which prevents or impedes loading. A Loading Disability includes any of the following which directly results in the inability to load a train at Origin: (1) an Act of God; (2) a strike or other labor disturbance; (3) a riot or other such civil disturbance; (4) unusual snow or ice accumulation sufficient to prevent or delay loading of a train; or (5) mechanical or electrical breakdown, explosion, or fire affecting the loading facilities at Origin.

Actual Placement is made when an empty train arrives at the designated loading point at Origin and the Train crew requests loading instructions. If Actual Placement is prevented due to any cause attributable to the Shipper, its agents, or the mine operator, BNSF may Constructively Place the train at any available holding point. In the event of Constructive Placement, Loading Free Time shall begin when BNSF notifies the Shipper, its agents, or the mine operator that the train has arrived at the holding point and shall end when the train is Actually Placed at Origin.

In the event that the total time from Actual or Constructive Placement to release of a loaded train exceeds Loading Free Time, Shipper shall pay such charges as specified in BNSF Price List 6041 series for holding a train in excess of Loading Free Time.

Unloading:

Coronado: Shipper or its agent shall be responsible for the provision of appropriate unloading facilities. Actual Placement for Unloading is made when a loaded train arrives at the designated unloading point at Destination and the train crew requests unloading instructions. All cars in each shipment shall be tendered to BNSF for empty movement; (1) within five (5) hours for a train of steel railcars or (2) six (6) hours for a train of aluminum cars, of Actual or Constructive Placement for unloading at Destination ("Coronado Unloading Free Time").

Cholla: Shipper or its agent shall be responsible for the provision of appropriate unloading facilities. Actual Placement for Unloading is made when a loaded train is placed on Shipper's tracks at Destination. All cars in each shipment shall be tendered to BNSF for empty movement within twenty-four (24) hours of Actual or Constructive Placement for unloading at Destination ("Cholla Unloading Free Time").

Unloading Free Time at Destination shall be extended for a period of time equivalent to that by which unloading is delayed or prevented as a result of an Unloading Disability or any occurrence attributable to BNSF which prevents or impedes unloading. An Unloading Disability is any of the following events which directly results in the inability to unload a train at Destination: (1) an Act of God; (2) a strike or other labor disturbance; (3) a riot or other such civil disturbance; (4) unusual snow or ice accumulation sufficient to prevent or delay unloading of a train; or (5) mechanical or electrical breakdown, explosion, or fire affecting the unloading facilities at Destination.

If Actual Placement at Destination is prevented due to any cause attributable to Shipper or its agents, BNSF may Constructively Place the train at any available holding point. In the event of Constructive Placement, Unloading Free Time shall begin when BNSF notifies Shipper or its agent that the train has arrived at the holding point and shall end when the train is Actually Placed at Destination. In the event that the total time from Actual or Constructive Placement to release of a loaded train exceeds Unloading Free Time, Shipper shall pay such charges as specified in BNSF Price List 6041 series for holding a train in excess of Unloading Free Time.

Accessorial Services: Coal unit train accessorial services and charges therefore, other than specified in this Common Carrier Pricing Authority, shall be as described in BNSF Price List 6041 series or successors thereto, except that no change in destination shall be permitted.

Billing and Payment: BNSF will bill each shipment under the terms of the Uniform Straight Bill of Lading. All railcars for each shipment are to be billed on one (1) Bill of Lading. This Common Carrier Pricing Authority BNSF 90040-A, correct address and patron code must be shown on the Bill of Lading to insure accurate billing. Freight charges will be billed by BNSF and paid by the Shipper by electronic transfer of funds within fifteen (15) calendar days of receipt of BNSF's invoice. In the event that the Shipper does not make timely payment, or if adverse credit conditions occur, which in BNSF's judgement could affect the Shipper's ability to meet payment terms, BNSF may require Shipper to pay cash in advance of service for all amounts for which Shipper is liable under this Common Carrier Pricing Authority.

Other Provisions: Shipments made under the provisions of this Common Carrier Pricing Authority are subject to the Uniform Freight Classification 6000 series or its successor, BNSF Rules 6100 series, applicable tariffs, statutes, federal regulatory rules and regulations, AAR rules, and other accepted practices within the railroad industry as may be amended from time to time.

CERTIFICATE OF SERVICE

Pursuant to 49 C.F.R. § 1111.3, I hereby certify, that I have this 17th day of December, 2004 caused to be served copies of this Verified Complaint by overnight express courier on the senior legal officers of Defendant The Burlington Northern and Santa Fe Railway Company ("BNSF") as follows:

Jeffrey R. Moreland, Esq.
Richard E. Weicher, Esq.
2500 Lou Menk Drive
Fort Worth, TX 76131-0039

and by hand delivery on outside counsel for BNSF, as follows:

Samuel M. Sipe, Jr., Esq.
Steptoe & Johnson
1330 Connecticut Avenue, N.W.
Washington, DC 20036



Andrew B. Kolesar III
An Attorney for Complainants